January 16, 2007

PUBLIC DOCUMENT
Total Pages: 13

VIA HAND DELIVERY
Susan H. Kuhbach
Senior Office Director for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870,
Pennsylvania Avenue and 14th Street, NW
Washington, DC 20230.

Re: Application of the Countervailing Duty Law to Imports from the People's Republic of China: Request for Comment

Dear Ms. Kuhbach:

The Society of the Plastics Industry, Inc. ("SPI") hereby timely responds to the Department of Commerce's ("the Department" or "Commerce") request for comments on the applicability of the countervailing duty ("CVD") law to imports from the People's Republic of China. *See* 71 Fed. Reg. 75,507 (December 15, 2006). SPI members are engaged in international trade and support the U.S. government's efforts to create a fair international trading environment. We welcome this opportunity to present our views on the application of the U.S. countervailing duty law to imports from non-market economies ("NMEs"), such as the People's Republic of China ("China" or "PRC"), and respectfully request that the Department consider our comments in its examination of this issue.

I. Introduction

SPI is the only plastics industry trade association representing companies that operate in all segments of the supply chain – processors, manufacturers of machinery, molds, and raw

materials (resins/polymers). Our more than 1,000 members participate in an industry that ships goods worldwide worth $345 billion and employs 1.3 million workers in nearly 20,000 facilities in every state. SPI members range from large multinational corporations to small and medium-sized companies, many of which are family-owned businesses, all playing a vital role in the delivery of myriad plastics products that enhance every aspect of our lives.

China is a significant market for the U.S. plastics industry. In 2003, China became the third largest export market for plastics industry goods, with exports valued at $1.32 billion.[1] This export growth continued in 2004 and 2005, leading to U.S. plastics exports worth $2.35 billion in 2005. Despite this robust growth in exports, the U.S. plastics industry is experiencing a very large and growing bilateral trade deficit with China, which amounted to $5.1 billion in 2005. The bilateral trade deficit is even more pronounced in processed plastic products, reaching $6.4 billion in 2005.

SPI and its members are deeply concerned about the threat posed to U.S. plastics manufacturing by Chinese imports, many of which benefit from various subsidies granted by the Chinese government in violation of China's obligations as a member of the World Trade Organization ("WTO"). SPI believes that Commerce has the authority to, and should, apply the CVD law to Chinese imports in order to ensure the continued effectiveness of that law as a remedy for U.S. companies and workers. The application of the CVD law to China is consistent with U.S. and WTO legal statutes. For the reasons outlined below, SPI believes that Commerce has the authority to change its current practice of non-application of the CVD law to the PRC

[1] Unless otherwise noted, "plastics industry goods" refers to products falling under four categories: resins/raw materials (HTS 3901-3915); plastics products - intermediate and final goods (HTS 3916-3926); plastics machinery and parts (HTS 8477, 8479); and plastics molds (HTS 8480).

and would be fully justified to do so in light of changes in the domestic and international legal context.

II. Past Practice Does Not Prohibit Reconsideration of the Application of the CVD Law to China

Neither the Commerce Department's 1984 determination in *Carbon Steel Wire Rod from Czechoslovakia,*[2] nor the Federal Circuit decision upholding Commerce, *Georgetown Steel Corp. v. United States,*[3] preclude the Department from now concluding that the current CVD statute permits cases to be brought against China.

In *Wire Rod*, the Department, interpreting the then-applicable countervailing duty statute, Section 303 of the Tariff Act of 1930, 19 U.S.C. § 1303, concluded that "bounties or grants cannot be found in nonmarket economies."[4] Subsequent deliberations by the U.S. Court of International Trade and the Federal Circuit produced conflicting determinations regarding the issue of the applicability of the CVD law to non-market economy countries. In light of ambiguity in the text of the underlying statute, the Federal Circuit in *Georgetown Steel* deferred to Commerce's interpretation of the statute, holding that "Congress has not defined the terms 'bounty' or 'grant' as used in Section 303. We cannot answer the question whether the statute applies to non-market economies by reference to the language of the statute."[5] The court also determined that Commerce's conclusion that benefits provided by NMEs are not bounties or grants is reasonable and in accordance with law.[6]

---

[2] *Carbon Steel Wire Rod from Czechoslovakia: Final Negative Countervailing Duty Determination,* 49 Fed. Reg. 19,370 (Dep't. Commerce, May 7, 1984) ("*Wire Rod*").

[3] 801 F.2d 1308 (Fed. Cir. 1986)("*Georgetown Steel*").

[4] *Wire Rod,* 49 Fed. Reg. at 19,370.

[5] *Georgetown Steel,* 801 F.2d at 1314.

[6] *Id.,* 801 F. 2d at 1318 (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. at 842-45).

This court decision demonstrates that Commerce's *practice* of not applying the CVD law to NMEs, which it has followed since the *Wire Rod* determination, is not *required* by *Georgetown Steel* or by the statute. In *Georgetown Steel,* the court decided that this practice reflected *a permissible interpretation* of an ambiguous statute. Commerce has recognized that *Georgetown Steel* merely upheld the agency's interpretation at that time that the CVD statute did not apply to non-market economies. For example, in the preamble to its 1998 CVD regulations, the Department referenced its "*practice* of not applying the CVD law to non-market economies," and noted that the First Circuit court "upheld this *practice* in Georgetown Steel Corp. v. United States."[7] As discussed below, this practice is *not* the only permissible interpretation of the statute. Commerce can and should reconsider and reverse its conclusion in *Wire Rod*, and find that the current CVD statute does apply to China.

III. Commerce Has the Legal Authority to Change Its Prior Practice

The Department has acknowledged in recent correspondence with the General Accounting Office that "there is no explicit statutory bar against applying the CVD law to NME countries."[8] Indeed, the adoption of a new definition of "subsidy" in the 1994 Uruguay Round Agreements Act (12 years after the *Wire Rod* decision) and the Chinese accession to the WTO (subsequent to the 1998 regulations in which Commerce last addressed this issue) all compel application of the CVD law to imports from China.

[7] Final Rule – Countervailing Duties, 63 Fed. Reg. 65,347, 65,360 (November 25, 1998) (emphasis added).

[8] *U.S. –China Trade: Commerce Faces Practical and Legal Challenges in Applying Countervailing Duties*, GAO-05-474 at 44 (June 2005) (Letter from Timothy J. Hauser to Loren Yager commenting on draft GAO report).

A. The Current Definition of Countervailable Subsidy in the U.S. CVD Statute Permits the Law's Application to China

The plain language of the current countervailing duty statute permits, if not compels, its application to China. The relevant statutory provision, 19 U.S.C. §1671(a), provides that countervailing duties shall be imposed if:

> (1) the administering authority determines that *the government of a country or any public entity within the territory of a country* is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States, and
>
> (2) in the case of merchandise imported from *a Subsidies Agreement country*, the Commission determines that—
>
> (A) an industry in the United States—
>
> (i) is materially injured, or
>
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation. (emphasis added).

There is no limitation of the statute's applicability to countries with a particular political or economic system. Rather, on its face, the statute applies to <u>all</u> countries. The only distinction is between Subsidies Agreement countries, which are subject to the injury test requirement, and other countries, which are not.

Similarly, the language of the statutory definition of "countervailable subsidy" does not require that such a subsidy be granted by a market economy. Rather, the definition of "subsidy" merely requires that a government (or a private entity funded by or under the direction of a government) make a financial contribution to a person, and thereby confer a benefit.[9] Such

[9] 19 U.S.C. § 1677(5)(b).

subsidies are countervailable so long as they are "specific."[10] This statutory definition is identical to the definition of a countervailable subsidy in the World Trade Organization's Agreement on Subsidies and Countervailing Measures ("SCM Agreement"),[11] to which China is a party. There can be no doubt that the Chinese government can and does grant subsidies that meet this definition.

B. The WTO's Agreement on Subsidies and Countervailing Measures Subjects China to CVD Cases Regardless of Market-Economy Status

Upon becoming a WTO member on December 11, 2001, China committed itself under public international law to the rights and obligations of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), one of the WTO's multilateral agreements that automatically enter into force at the time a country joins the WTO.[12] More recently, Vietnam – another country with a non-market economy – likewise became a party to the SCM Agreement upon its accession to the WTO on January 11, 2007.[13]

The SCM Agreement's provisions are clear and make no distinction between market-economy and non-market-economy countries regarding the SCM Agreement's operation. As long as (i) there is a governmental financial contribution, (ii) that confers a benefit upon the recipient, and (iii) that is specific, the SCM Agreement stipulates that there is a countervailable subsidy.[14] This even-handedness makes sense from the standpoint of the most-favored nation (MFN) requirement and from the vantage point that the governments of countries with non-

[10] 19 U.S.C. § 1677(5)(a).

[11] SAA, 1994 U.S.C.C.A.N at 4238.

[12] *See*, Protocol on the Accession of the People's Republic of China ("China Accession Protocol"), at ¶ 15, WT/L/432 (Nov. 23, 2001) (". . . the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member . . . .").

[13] *See*, Report of the Working Party on the Accession of Viet Nam, at ¶ 255, WT/ACC/VNM/48 (Oct. 27, 2006).

[14] *See* SCM Agreement, at Articles 1, 2, and 3.

market economies can and regularly do confer countervailable subsidies just as market-economy countries' governments can and do.[15]

Consequently, under China's Protocol of Accession to the WTO, the SCM Agreement applies to China's exports to other WTO member states regardless of whether the WTO member applying the countervailing measure treats China as a non-market economy for the purposes of its antidumping law. The Protocol explicitly permits WTO members to continue to treat China as an NME for dumping purposes for up to 15 years from the date of China's accession, and there is absolutely no linkage in the terms of the protocol between China's NME status and the applicability of countervailing measures to that country.[16]

The failure by the United States to apply the SCM Agreement against subsidized, injurious imports from China in effect provides substantially differential treatment favoring the PRC *vis-à-vis* other member states that are considered to be market economies by the United States. Such a distinction is a notable departure from the most-favored-nation ("MFN") principle in Article I of the WTO's General Agreement on Tariffs and Trade. If it was intended, it would undoubtedly have been negotiated extensively and made explicit in China's Accession Protocol. There is nothing, however, in China's Protocol of Accession to this effect, and no negotiations on this score seem to have occurred.[17]

Therefore, the SCM Agreement's terms and conditions are clearly binding upon the PRC under public international law. China's acceptance of the disciplines of the SCM Agreement,

---

[15] Again, if the Member States of the WTO had intended to draw a distinction in the SCM Agreement regarding the ability to countervail subsidies granted by market-economy countries' governments but not those by NME countries' governments, language to that end would have been employed in the SCM Agreement.

[16] China Accession Protocol., Article 15(d), WT/L/432 (November 23, 2001).

[17] What rights China did reserve under the SCM Agreement, for example under Articles 27.10, 27.11, 27.12, and 27.15 concerning developing countries, actually reinforce the conclusion that the SCM Agreement generally shall apply to Chinese-origin products. *See* Report of the Working Party on the Accession of China, at 33-34, WT/ACC/CHN/49 (Oct. 1, 2001).

including the potential application of countervailing duties to its imports, is an integral part of that country's WTO Accession Protocol. Application of the CVD law against China is thus necessary to fully implement the rights of the United States under the Protocol. Lastly, it is important to note that China has identified a number of subsidy programs that are countervailable under the SCM Agreement in both its Accession Protocol,[18] and a subsequent notification to the WTO Committee on Subsidies and Countervailing Measures.[19]

C. The Uruguay Round Agreements Act Faithfully Implements The SCM Agreement, Including CVD Provisions for Both Market and Non-Market Economies

Congress executed the SCM Agreement into U.S. domestic law by means of the Uruguay Round Agreements Act of 1994. As of January 1, 1995, therefore, the definition of what constitutes a countervailable subsidy was established in 19 U.S.C. §§ 1677(5) and (5A) consistent with and accurately reflective of the definition of a countervailable subsidy in Articles 1, 2, and 3 of the SCM Agreement. Accordingly, U.S. domestic law provides that a countervailable subsidy exists if (i) there is a governmental financial contribution (19 U.S.C. § 1677(5)(B)(i)), (ii) that confers a benefit upon a person (19 U.S.C. § 1677(5)(B)), and (iii) that is specific (19 U.S.C. §§ 1677(5)(A) and (5A)).

Of great importance, this faithful implementation of the SCM Agreement in U.S. domestic law means that there is no differentiation between market-economy and non-market-economy countries. If the above criteria are met, there is a countervailable subsidy regardless of whether it is conferred by the government of a market-economy or a non-market-economy country. Moreover, this even-handedness satisfies the WTO's mandatory MFN standard.

---

[18] China's Accession Protocol, WT/L/432 at Annex 5A, 69-89 (November 23, 2001).

[19] People's Republic of China -- New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the SCM Agreement, G/SCM/N/123/CHN (April 13, 2006).

D. Commerce Should Change Its Practice On CVD Cases Against Non-Market Economies Based On The Current Legal and WTO Context

In light of the fact that the current CVD statute resulted from 1994 revisions intended to implement the U.S. rights and obligations under the SCM Agreement, Commerce is arguably *required* to permit the application of the CVD law to China, which has accepted the discipline of that agreement as a condition of its entry into the WTO. At the very least, there is no doubt that Commerce may exercise its discretion to permit cases to be brought against China under the law. Where the statute is silent or ambiguous on an issue, Commerce has the authority to determine its appropriate interpretation, and reviewing courts must defer to this interpretation so long as it is reasonable.[20] Moreover, court deference to Commerce regarding such interpretations is heightened because Commerce is deemed to have unique expertise with respect to the antidumping and countervailing duty laws.[21]

It would clearly be reasonable to interpret the CVD statute to apply to China. The CVD statute is intended to "protect American firms from {…} the unfair competitive advantage a foreign producer would have in selling in the American market if that producer's government in effect assumed part of the producer's expenses of selling here."[22] Given this mandate, Commerce should interpret the statute broadly to maximize its ability to remedy unfair trade. It is clear that subsidized Chinese imports pose a massive threat to U.S. manufacturing. Application of the CVD law to China is thus not just reasonable, but necessary to give full effect to the remedial purpose of that law.

---

[20] *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)). This required deference applies both to statutory interpretations adopted through formal rulemaking and to interpretations arrived at in the context of trade remedy proceedings. *Id.*, 266 F.3d at 1372.

[21] *Id. See* also *United States v. Zenith Radio Corp.*, 562 F.2d 109, 1316 (C.C.P.A. 1977), aff'd 437 U.S. 443 (1978).

[22] *Georgetown Steel Corporation v. United States*, 801 F.2d 1308, 1315 (Fed. Cir. 1986). *See* also *Zenith Radio Corp. v. United States*, 437 U.S. 443, 455-56 (1978).

Commerce is not barred from adopting this reasonable interpretation simply because it adopted a different interpretation in interpreting a different statute more than twenty years ago. It is "well-established that Commerce may depart from a prior practice" and that this departure must be upheld by the courts "so long as [Commerce] provides a 'reasoned analysis' for its change."[23] The *Wire Rod* determination and Commerce's subsequent adherence to that decision thus do not operate as a legal bar to the application of the current CVD law to imports from China. It is beyond dispute that Commerce has the authority to reconsider its practice of not applying the CVD law to NME countries.

E. Summary

The court approval in 1998 in the *Georgetown Steel* case of Commerce's discretion not to apply the old CVD law to subsidies by NME countries' governments has been superseded by the SCM Agreement, as implemented in U.S. domestic law by the Uruguay Round Agreements Act. As a result, the Department is allowed – if not obligated – to apply the CVD law across the board to subsidized, injurious imports from both market-economy and NME countries. This conclusion is punctuated by China's Protocol of Accession to the WTO, which has committed the PRC to the application of the SCM Agreement to subsidies provided by the Chinese government that conform to the new definition of a countervailable subsidy. Additionally, by not distinguishing between market-economy and NME countries' subsidies, the SCM Agreement and U.S. domestic law achieve the non-discriminatory treatment that is required by Article I of the General Agreement on Tariffs and Trade.

[23] *Allegheny Ludlum Corp. v. United States*, 24 C.I.T. 452, 458 (Ct. Int'l Trade 2000). *See* also *Rust v. Sullivan*, 500 U.S. 173, 187, 111 S. Ct. 1759, 114 L. Ed. 2d 233; *Motor Vehicle Mfgs. Ass'n of the United States*, Inc. *v. State Farm Mutual Automobile Ins. Co*., 463 U.S. 29, 42, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983); *accord Mantex, Inc. v. United States*, 17 C.I.T. 1385, 1399, 841 F. Supp. 1290, 1302-03 (1993).

IV. Practical Difficulties In Applying the CVD Law To China Are Overstated

In directing that the CVD law be applied to NME countries, the present international and U.S. domestic legal regime governing CVD proceedings provides the means for Commerce to fairly measure subsidies in NME countries. Specifically, China's Protocol of Accession supplies Commerce with the flexibility necessary to select an appropriate benchmark for its subsidy calculations. While practical difficulties may arise in performing its calculations in NME cases, Commerce has overcome similar difficulties in market-economy cases.[24] The Department's experience in market-economy cases demonstrates that it possesses the technical proficiency necessary to measure subsidies, whether in market-economy or NME cases.

The terms and conditions set forth in the PRC's Protocol of Accession provide Commerce with the necessary leeway to select an appropriate benchmark for purposes of measuring Chinese subsidies. Article 15(b) describes the procedure to be followed by the Department in its selection of a benchmark.[25] Should Commerce find in a particular case that the Chinese market is distorted to such an extent that no reasonable commercial benchmark is available within China, Commerce is expressly authorized under Article 15(b) to use third-country benchmarks.[26] Thus, Commerce is authorized to select an appropriate benchmark and, thereby, to reasonably measure subsidies conferred in China.

---

[24] Importantly, the international and domestic legal regime does not distinguish between market-economy and NME countries. If such a distinction were intended, the SCM Agreement, the U.S. CVD statute, and the PRC's Protocol of Accession would include specific language to that effect.

[25] *See* Accession of the People's Republic of China, at ¶ 15(b), WT/L/432 (Nov. 23, 2001). A similar framework will apply to Vietnam, another NME country, pursuant to the terms of its Protocol of Accession to the WTO. *See, e.g.*, Report of the Working Party on the Accession of Viet Nam, at ¶ 255, WT/ACC/VNM/48 (Oct. 27, 2006).

[26] The U.S. CVD law recognizes that such practical difficulties will arise in cases and allows Commerce to adjust its benefit calculations as necessary in such situations. *See, e.g.*, 19 C.F.R. § 351.511 (providing a hierarchy for selecting a benchmark price to determine whether a governmentally good or service is provided for less than adequate remuneration and permitting the use of external benchmarks in certain circumstances).

Additionally, while subsidy calculations are highly fact-specific and best addressed in the context of a particular case, Commerce's expertise developed in prior market-economy CVD cases will serve well in quantifying subsidies in NME CVD cases. Commerce has, for instance, devised alternative benchmarks for purposes of measuring the benefit conferred by various forms of financial contributions, including the provision of goods and services,[27] loans,[28] equity infusions,[29] and grants.[30]

In sum, Commerce's ability to adapt its subsidy calculations to varying factual situations in prior market-economy cases demonstrates that it possesses the expertise and competence to develop appropriate methodologies to quantify subsidies in NME cases. By applying this technical proficiency within the framework set out in the PRC's Protocol of Accession, Commerce will be able to apply the U.S. CVD law effectively in specific cases to imports from China.

[27] *See, e.g.*, Issues and Decision Memorandum: Final Results of the Countervailing Duty Investigation of Certain Lined Paper Products from Indonesia at 34 (Aug. 9, 2006), referenced in 71 Fed. Reg. 47,174 (Aug. 16, 2006) (selecting an "out-of-country benchmark" in the form of Malaysian log prices due to the Government of Indonesia's predominant role in the Indonesian market); Final Affirmative Countervailing Duty Determination: Steel Wire Rod From Germany, 62 Fed. Reg. 54,990, 54,994 (Oct. 22, 1997) (explaining that "there may be no alternative market prices available in the country. Hence, it becomes necessary to examine other options for determining whether the good has been provided for less than adequate remuneration.").

[28] *See, e.g.*, Final Affirmative Countervailing Duty Determination: Structural Steel Beams From the Republic of Korea, 65 Fed. Reg. 41,051 (Jul. 3, 2000) (applying alternative private benchmarks for loans to account for the Government of Korea's influence over the practices of lending institutions in Korea).

[29] *See, e.g.*, Cold-Rolled Carbon Steel Flat-Rolled Products From Argentina; Preliminary Results of Countervailing Duty Administrative Review, 62 Fed. Reg. 38,257, 38,260 (Jul. 17, 1997) (converting equity infusions into U.S. dollars to account for hyperinflation in Argentina and changes in the Argentine currency during that time period).

[30] *See, e.g.*, Final Affirmative Countervailing Duty Determinations: Certain Steel Products From Mexico, 58 Fed. Reg. 37,338 (Jul. 9, 1993) (using a loan-based methodology to calculate the benefit from non-recurring grants to address distortions caused by hyperinflationary conditions in Mexico).

V. Conclusion

The U.S. plastics industry is facing unprecedented global competition and recognizes that the challenges brought forth by such international pressures and rising domestic pressures have led to domestic economic changes. To address these changes, SPI supports government policies that enhance the competitiveness of U.S. manufacturing and the U.S. plastics industry and remedy the impact of unfairly-subsidized imports in the domestic market. Thus, SPI believes that non-market economies, such as China, should be subject to the provisions of the countervailing duty law.

For the reasons outlined above, SPI urges the Department to reconsider its practice of not applying the countervailing duty law to non-market economy countries and to conclude that the law does apply to imports from China.

* * * *

We hope that the Department of Commerce finds this information helpful as it considers the applicability of the CVD law to China. If you would like additional information from SPI or have questions, please do not hesitate to contact the undersigned.

Respectfully submitted,

Eugenia Iankova Ross
Director, International Trade
(202) 974-5219